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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JOSEPH THOMAS BARTUCCI, JR.,

Petitioner,

v.

MICHAEL J. JACKSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether the unchallenged and admissible expert opinion of Dr. L. Mulry Tetlow established a material issue of fact concerning whether or not Thomas Bartucci was reasonable, as he stated in sworn answers to interrogatories, in not immediately remembering the abduction and sexual abuse by Michael Jackson, so as to preclude summary judgment on the issue of whether or not a suit twenty years later was timely filed.

2. May summary judgment be granted when there is an admissible and an unDauberted expert opinion in appropriate form addressing the precise factual issue before the court?

3. Was the decision of the court of appeal as to the reasonableness of Mr. Bartucci's recovery of his memory of abuse by Michael Jackson impermissible fact finding in the context of summary judgment?

RULE 10 REVIEW ON CERTIORARI

There is a conflict between the decision of the Court of Appeal for the 5th Circuit in this case and the decisions of other United States Courts of Appeal in *Jahn v. Equine Services*, 233 F.3d 382, 393 (6th Cir. 2002), *Thomas v. Newton international Enterprises*, 42 F.3d 1266, 1270 (9th Cir. 1994), *McKendall v. Crown Control Co.*, 122 F.3d 803, 807-808 (9th Cir. 1997), *Kauffman v. Manchester Tank & Equipment Company*, 1999 U.S. App. LEXIS 32173, 9-10 (9th Cir. 1999), *Biegler v. Kleppe*, 633 F.2d 531 (9th Cir 1980), *Thrasher v. B&B Chemical Company Inc*, 2F.3d 995, 998 (10th Cir. 1993) and with decisions of the Supreme Courts of Louisiana in *Indep. Fire Ins. Co. v. Sunbeam Co.*, 99-2181 (La. 2000), 755 So.2d 226, 237, of Indiana in *Doe v. Shults-Lewischild and Family Service Inc*, 718 N.E.2d 738 (Ind. 1999), of Hawaii in *Acoba v. General Tire Inc.*, 986 P.2d 288 (Hawaii 1999), and of South Carolina in *Baughman v. American Telephone and Telegraph Company*, 410 S.E.2d 537 (S.C. 1991) concerning the effect of competent and admissible expert testimony on the granting of a motion for summary judgment.

RULE 14.1 STATEMENT

Petitioner (plaintiff-appellant below) is Joseph Thomas Bartucci, Jr.

Respondent (defendant-appellee below) is Michael J. Jackson.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 10 REVIEW ON CERTIORARI ii

RULE 14.1 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES iv

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

STATEMENT OF ISSUES PRESENTED 4

REASONS FOR GRANTING THE PETITION 5

I. TETLOW'S TESTIMONY WAS ADMISSIBLE 6

II. DR. TETLOW'S OPINION AS TO THE REASONABLENESS OF BARTUCCI'S ACTIONS WENT DIRECTLY TO THE ISSUE OF PRESCRIPTION 9

III. ADMISSIBLE EXPERT TESTIMONY DEFEATS SUMMARY JUDGMENT 12

CONCLUSION 14

TABLE OF APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the Fifth Circuit filed August 22 2007 (5th Cir. La. 2007) 1a

Appendix B – Order of the Court of Appeal for the Fifth Circuit of October 15, 2007, denying petitioners' petition for rehearing 10a

Appendix C – Opinion and order the United District Court for the Eastern District of Louisiana decided April 12, 2006 11a

Appendix D – Opinion and order the United District Court for the Eastern District of Louisiana decided September 12, 2006, and filed September 13, 2006 19a

Appendix E – Opinion of Dr. L. Mulry Tetlow, March 4, 2005. 33a

TABLE OF AUTHORITIES

CASES	Page(s)
Acoba v. General Tire Inc., 986 P.2d 288 (Hawaii, 1999)	ii, 13
Bartucci v. Jackson, 2007 U.S. App. LEXIS 20045	1
Bartucci v. Jackson, 2006 U.S. Dist. LEXIS 20072	1
Bartucci v. Jackson, 2007 U.S. Dist. LEXIS 65342	1
Baughman v. American Telephone and Telegraph Company, 410 S.E.2d 537, (South Carolina 1991)	ii, 13
Biegler v. Kleppe, 633 F.2d 531 (9th Cir 1980)	ii, 12
Carroll v. Otis Elevator Company, 896 F.2d 210, 211 (7th Cir. 1990)	7
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 125 L. Ed. 2d 469	6
Doe v. Archdiocese of New Orleans, 823 So. 2d 360, 366-67 (La. App. 4th Cir. 2002)	10
Doe v. Shults-Lewischild and Family Service, Inc, 718 N.E.2d 738 (Ind. 1999)	ii, 7, 11 , 13
Espeaignnette v. Gene Tierney Co., Inc., 43 F.3d 1, 10-11 (C.A.1 (Me.) 1994)	8

Isley v. Capuchin Province, 877 F.Supp. 1055 (E.D. Mich. 1995) 8

Indep. Fire Ins. Co. v. Sunbeam Co., 99-2181 (La. 2/29/00), 755 So.2d 226, 237 ii, 13

Jahn v. Equine Services et al, 233 F.3d 382, 393 (6th Cir. 2002) ii, 12

Kauffman v. Manchester Tank & Equipment Company, 1999 U.S. App. LEXIS 32173, 9-10 (9th Cir. 1999) ii, 12

Kopf v. Skyrm, 993 F.2d 374, 377-79 (C.A.4 (Md.) 1993) 8

McKendall v. Crown Control Corp et al, 122 F.3d 803, 807-808, (9th Cir. 1997) ii, 12

Peters v. Five Star Marine Serv., 898 F.2d 448, 449 (5th Cir. 1990) 7

Smith v. United Gas Pipeline Co., 857 F.2d 1471 (5th Cir. 1988) 7

Thomas v. Newton international Enterprises, 42 F.3d 1266, 1270 (9th Cir. 1994) ii, 12

Thrasher v. B&B Chemical Company Inc, 2 F.3d 995, 998 (10th Cir. 1993) ii, 13

STATUTES RULES AND REGULATIONS

Federal Rules of Civil Procedure 56 12

Federal Rules of Evidence 702 6

PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Thomas Bartucci, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit rendered in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Bartucci v. Jackson*, 2007 U.S. App. LEXIS 20045 (App. A, p.1a-7a). The order of the court of appeals denying petitioners' petition for rehearing (App. B, p.8a), entered on October 15, 2007 is unreported. The opinions of the district court are reported respectively at 2006 U.S. Dist. LEXIS 20072 (App. C, p.9a-14a) and 2006 U.S. Dist. LEXIS 65342 (App. D, p.15a-26a).

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2007. Petitioner's timely petition for rehearing was denied on October 15, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The original complaint of November 1, 2004 details Thomas Bartucci's claim that Michael Jackson, a famous entertainer and a person with a very poor sexual reputation, committed sexual assault, sexual battery and abuse on him; assault and battery, false imprisonment and intentional infliction of emotional distress. More than a year later, on December 29, 2005 and without any oral or any other satisfactory discovery or even a scheduling order, Jackson filed a motion to dismiss for failure to

state a claim and alternatively, motion for summary judgment that lacked an affidavit or even a serious contention that Jackson was not in New Orleans at the time of the Louisiana World's Fair in 1984 when the alleged abduction took place. Oral argument on Jackson's motion was held on January 18, 2006 with the main thrust of the argument and the district court's stated desire being that the deposition Bartucci's expert, Dr. L. Mulry Tetlow be taken [see RE 7 p.39[1]]. Moreover, the affidavit of Wayne Nagin, which had just been filed and which suggested that Jackson was not in New Orleans because Nagin was in possession of a handwritten appointment book of appointments during that same period, was filed four days prior to hearing and was not even mentioned in oral argument.

The ordered deposition of Dr. Tetlow took place on February 20, 2006. However, no further discovery could be conducted because the district court had stopped discovery until he evaluated Dr. Tetlow's qualifications and testimony. In the meantime (January 20, 2006), plaintiff filed his sworn answers to defendant's interrogatories [RE 8,9,10,11 pp.40-47], in which Bartucci unequivocally stated that Michael Jackson was in New Orleans on May 19-20, 1984 and vividly described the horrible and despicable acts committed on him during his imprisonment during the next nine days as well as his inability to recall the abuse until the November, 2003 Court TV Special on Jackson's arrest and criminal trial. Jackson filed an affidavit of another witness on March 21, 2006, but Bartucci had no

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[1] These refer to the numbers and pages of the Record Excerpts (RE) filed in the 5th Circuit.

chance to depose, cross examine, and traverse defendant's witnesses or to take Jackson's deposition, even though Bartucci requested such depositions, and the district court appeared to respond favorably in oral argument to this request [Dkt.126-R-1009-RE 14- p.56 line1], there being no opposition from Jackson to the depositions of these witnesses.

Summary judgment was granted on April 13, 2006 [Dkt.88-R-832-RE6-p.38] and a corresponding order and reasons was entered on April 18, 2006 [Dkt.89-R-833-RE 5-p.31; App C, p.9a-14a]. No ruling was made on the plea of prescription, consideration of which was reserved. On April 28, 2006, Bartucci filed a reconsideration motion based on his answers to interrogatories, which had not been referenced in the opinion. On August 23, 2006, Bartucci filed a more specific affidavit of the police officer who witnessed Jackson's white limousine being in New Orleans and in the area of the 1984 World's Fair on the identical dates alleged by plaintiff [Dkt. 112-R-956-RE 12-p.48]. Further oral argument on the motion for reconsideration was held on August 24, 2006 [Dkt.124-R-999- RE 16-p.61].

The Order denying reconsideration was rendered on September 13, 2006 [Dkt.114-R.964-974-RE-3; App. D, p.15a-26a]. The district court, after therein correctly stating the law that affidavits establish issues of material fact in a case, ruled to the contrary and disregarded Bartucci's own verified answers to interrogatories and his witnesses' affidavits. Notice of appeal was filed on September 25, 2006 [Dkt.115-R-975-RE2-p.17].

In its opinion of August 22, 2007 [App. A, p.1a-7a], the Fifth Circuit acknowledged that Bartucci

established a factual issue as to whether Jackson was in New Orleans on May 19, 1984 and thus met his burden on this summary judgment issue, acknowledged Bartucci's discovery responses and the opinion of Dr. Tetlwo, but affirmed the judgment finding that Bartucci's claim was prescribed (a contention which had not been ruled on by the district court), but without considering the effect of Dr. Tetlow's contrary expert opinion or Bartucci's contrary sworn discovery responses.

Bartucci timely filed an application for panel rehearing which was denied on October 15, 2007 [App. B., p.8a]

STATEMENT OF ISSUES PRESENTED

1. Was it appropriate for the court below to affirm a grant of summary judgment based on a plea of prescription (passage of the statute of limitation) that, which, while it was the sole initially asserted ground for summary judgment/dismissal in the district court, was not seriously argued by the parties after the court-ordered deposition of Dr. L. Mulry Tetlow, a clinical psychologist with expertise in repressed memory cases, or should the matter have been remanded.

2. Having chosen to consider a basis for affirmance specifically not considered by district court, was the court of appeals in error in not carefully considering the summary judgment record, which included Tetlow's expert opinion and deposition, pleadings summarizing it, and sworn discovery of Bartucci that, if believed by a jury, was sufficient to prevent summary judgment on this issue?

3. The expert opinion of Dr. Tetlow (App. E), as

to which a *Daubert* challenge was only verbally made and then not pursued after extensive deposition examination, that included his methodology and the testing of that methodology by peer review, was that Bartucci acted reasonably in discovering his repressed memory of Jackson's actions. Was that alone or in connection with Bartucci's own sworn discovery answers sufficient to prevent summary judgment on the issue of prescription?

4. Inasmuch as, as appears from a review of Louisiana law, the issues of repressed/recalled memory and the reasonableness thereof are a proper subject of expert testimony, was it appropriate for the court of appeal to substitute its own opinion of reasonableness for that of an expert whose properly admissible contrary opinion, although challenged under *Daubert*, had not been ruled on, much less excluded?

5. Does the opinion of Dr. Tetlow require that consideration of prescription under Louisiana law be done by a fact finder after presentation of evidence rather than on motion for summary judgment, so that summary judgment should have been denied simply on account of this admissible contrary expert opinion?

REASONS FOR GRANTING THE PETITION

The decision of the Fifth Circuit Court of Appeals, not considering admissible and unDauberted expert testimony as raising an issue of material fact on consideration of a motion for summary judgment, conflicts with principles established by other circuits and by the highest courts of several states.

I.
TETLOW'S TESTIMONY WAS ADMISSIBLE

Federal Rules of Evidence Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Admissibility of expert testimony must be also evaluated considering the criteria established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), to ensure that the experts testimony are reliable, to wit:

> (1) whether the expert's theory can be or has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error of a technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) the degree to which the technique or theory has been generally accepted in the scientific community.

Helpfulness to the trier of fact, an important test of admissibility, was clearly met by the opinion of Dr. Tetlow (App. E, p.27a-28a) who has a specialized understanding of the issues concerning post traumatic stress disorder and especially repressed

memory, because the subject of repressed memory is something about which a normal layman or non expert would not normally have any knowledge.

For instance, *Doe v. Shults-Lewischild and Family Service, Inc.*, 718 N.E.2d 738 (Ind. 1999), the Supreme Court of Indiana stated:

> When asserting recovered repressed memories as justification for the delayed claim, plaintiff must present expert opinion regarding his or her experience of repressed memories, and evidence sufficient for the trial court initially to determine whether the opinion is based on reliable scientific principles. Expert opinion is appropriate when it will "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Ind. Evidence Rule 702(a). As memory repression is a phenomenon beyond the ability of the average juror to understand, expert testimony is needed to explain the phenomenon to the jury. If expert opinion testimony is needed, a "witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Evid. R. 702. Rule 702(b) imposes an additional requirement that, in order for the testimony to be admitted, the court must be satisfied that the expert scientific testimony is based on reliable scientific principles.

See also as to helpfulness, *Peters v. Five Star Marine Serv.*, 898 F.2d 448, 449 (5th Cir. 1990) and *Smith v. United Gas Pipeline Co.*, 857 F.2d 1471 (5th Cir. 1988) and *Carroll v. Ottis Elevator Company*,

896 F.2d 210,211 (7th Cir. 1990), *Espeaignette v. Gene Tierney Co., Inc.*, 43 F.3d 1, 10-11 (C.A.1 (Me) 1994), and *Kopf v. Skyrm*, 993 F.2d 374, 377-79 (C.A.4 (Md.) 1993).

The opinion and testimony of Dr. Tetlow (App. E, p.27a-28a) met all criteria established by *Daubert* and by Rule 702. He is a licensed clinical psychologist and a retired college professor, who has a special interest in post traumatic stress disorder and particularly repressed memory. According to him, the fact that very painful experience can be repressed is well established in the metal health profession, and this conclusion has been the subject of numerous articles and learned papers. His initial opinion on Bartucci, supported by subsequent treatment, is that Bartucci's experience fits the pattern of repressing sexual abuse that is later recalled after learning of someone's else experience of abuse. *Cf.*, *Isley v. Capuchin Province*, 877 F.Supp. 1055 (E.D. Mich, 1995):

> In this case, Dr. Hartman knowledgeably testified about several studies which have validated the theory of repressed memory. Whether other experts agree with the theory or not, because there is no absolute empirical way to prove that (1) an event happened and/or (2) that the memory of it was repressed, it will be up to the jury to determine the probative value of Dr. Hartman's opinion. In the Court view, there is a sufficient scientific basis of support for the theory in Dr. Hartman's field of expertise, through the studies and writings, to permit the issue to go to the jury.

> For the foregoing reasons, the Court finds that Dr. Hartman is qualified to testify as an expert and give opinion testimony regarding PTSD and repressed memory in this case.

Here also, Dr. Tetlow's report and opinion (App. E, p.27a-28a) were challenged unsuccessfully by Jackson under *Daubert*. Jackson often suggested the possibility of a *Daubert* hearing [Dkt 120-983, 988; Dkt 61-R-419] but, as the plaintiff pointed it out, he never filed a formal *Daubert* motion [Dkt 66-R-483] and, during the hearing held on June 7, 2006, Judge Fallon stated that:"we don't have any *Daubert* hearing or we haven't had any *Daubert* hearing." While Jackson provided plenty of inadmissible hearsay, he submitted no contrary expert opinion.

II.
DR. TETLOW'S OPINION AS TO THE REASONABLENESS OF BARTUCCI'S ACTIONS WENT DIRECTLY TO THE ISSUE OF PRESCRIPTION

In affirming the grant of summary judgment, the court of appeal concluded:

> Consequently, Bartucci has not met his burden of showing an exception to prescription under Louisiana law. His severe and permanent injuries, as well as his loss of nine days of memory, would have caused a reasonable person to inquire further into what happened. Because Bartucci's failure to investigate the alleged torts committed against him was unreasonable, the prescriptive period is not tolled, and Bartucci's claims against Jackson are barred.

In reaching this conclusion, the court of appeal referred to but necessarily disregarded the decisive

force Dr. Tetlow's testimony and opinion wherein he explains, on the basis of the theory of repressed memory, why Bartucci was not able to file a claim before November 1, 2004 and why this was not unreasonable even though Bartucci was not a minor as was the plaintiff in *Doe v. Archdiocese of New Orleans*, 823 So. 2d 360, 366-67 (La. App. 4th Cir. 2002).

In *J.A.G. v. Schmaltz*, 95-2755 (La.App. 4 Cir. 10/23/96); 682 So.2d 331, the district court, after a trial, chose the opinion of other experts over that of Dr. Tetlow, and the court of appeal affirmed. At pages 335-36, the testimony and opinion of Dr. Tetlow, who was accepted as an expert, was kindly treated, but the court of appeal was bound by the manifest error rule, "while this Court might have decided differently . . ." In the instant case, there are no experts other than Dr. Tetlow, there has been no trial, no *Daubert* motion was brought, and Dr. Tetlow's deposition demonstrated his competence, reliance on appropriate authority, and peer review by other eminent experts in his field.

In *Corsey v. State, Through the Department of Corrections*, 375 So.2d 1319, 1321-1323 (La. 1979), the Louisiana Supreme Court explained the doctrine of *contra non valentem*[2] and held it applicable to prevent the running of prescription, the Supreme Court of Louisiana, through Justice Tate, stated, *id.*, at 1323:

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[2] *Contra non valentem* is a shorthand term for *contra non valentem agree nulla currit praescriptio,* which means that prescription does not run against a party who is unable to act. The maxim *contra non valentem,* which comes from Roman law, has been recognized from the time of Louisiana's earliest jurisprudence.

> The fault or wrongful conduct of the defendant which prevents the plaintiff from suing timely is a traditional *Contra non valentem* reason to except the plaintiff's claim from prescriptive extinguishment (see footnotes 7 and 11 above). We find this principle here applicable.

In *Doe v. Shults-Lewischild and Family Service Inc*, 718 N.E.2d at 747, the Supreme Court of Indiana, stated:

> The expert opinion testimony submitted by Jane. I both adequately demonstrates a genuine issue of fact regarding the validity of the phenomenon of repressed memory as well as whether the abuse by Defendant caused her to repress memory of the abuse. Finally, we believe that Jane I brought this claim within a reasonable period after discovering the abuse.

By introducing Dr. Tetlow's opinion and testimony that Jackson's fault and wrongful conduct prevented him from timely suing as well as his own sworn deposition responses that stated that he did indeed have an inability to act until that time, Bartucci should have been held to have met his burden, for summary judgment purposes only, of establishing an inability to act, which is an exception under Louisiana law to the running of prescription.

Most importantly, the court of appeal expressly pointed out (App A, p.5a) that Dr. Tetlow found Bartucci credible when he asserts that he repressed the memories of Jackson's alleged assault for 20 years. Despite that recognition, that court appeal granted the summary judgment whereas summary judgment is inappropriate when expert testimony supports the non moving party on a critical factual

issue.

III.
ADMISSIBLE EXPERT TESTIMONY DEFEATS SUMMARY JUDGMENT

As a general rule not here applied by the Fifth Circuit, summary judgment is inappropriate where expert testimony supports a non moving party's case. This general rule, grounded on Federal Rule of Civil Procedure 56(e), presupposes that the expert testimony would be admissible in evidence, which has here been demonstrated as to the testimony of Dr. Tetlow testimony.

The refusal by the Fifth Circuit to hold that admissible expert testimony is sufficient to prevent summary judgment establishes a conflict with decisions of other courts of appeal, *Jahn v. Equine Services*, 233 F.3d 382, 393 (6th Cir. 2002) (summary judgment reversed because expert testimony had been improperly excluded); *Thomas v. Newton international Enterprises*, 42 F.3d 1266, 1270 (9th Cir. 1994);[3] *McKendall v. Crown Control Co.*, 122 F.3d 803, 807-808 (9th Cir. 1997) (reversing summary judgment based on contrary expert testimony that was "both 'facially helpful and relevant' and seemingly reliable."; *Kauffman v. Manchester Tank & Equipment Company*, 1999 U.S. App. LEXIS 32173, 9-10 (9th Cir. 1999) (reversing summary judgment because court cannot reject expert opinion that was reasonable and the expert competent); *Biegler v. Kleppe*, 633 F.2d 531 (9th Cir 1980) (reversing judgment considering the admissible

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[3] "Expert opinion evidence is itself sufficient to create a genuine issue of disputed fact sufficient to defeat a summary judgment motion."

expert testimony that defendant did not move to strike or otherwise object); *Thrasher v. B&B Chemical Company Inc*, 2F.3d 995, 998 (10th Cir. 1993) (expert testimony identifying a defect or weakness in design was sufficient to create a jury question and to reverse summary judgment) and the jurisprudence of the highest court of Louisiana, *Indep. Fire Ins. Co. v. Sunbeam Co.*, 99-2181 (La. 2/29/00), 755 So.2d 226, 237 (an unchallenged expert affidavit submitted by the nonmoving party is fatal to summary judgment),[4] of Indiana, *Doe v. Shults-Lewischild and Family Service Inc*, 718 N.E.2d 738,[5] of Hawaii, *Acoba v. General Tire Inc.*, 986 P.2d 288 (Hawaii, 1999) (explosion of a tire), and South Carolina, *Baughman v. American Telephone and Telegraph Company*, 410 S.E.2d 537, (South Carolina 1991) (summary judgment reversed because the appellants had procured an expert).

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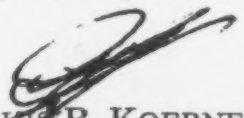
[4] Assuming no credibility determination is at issue, the trial judge must consider this evidence if he or she determines that such evidence would be admissible at trial. If qualifying evidence is submitted in opposition to a motion for summary judgment which creates a dispute as to a genuine issue of material fact, the motion for summary judgment should be denied.

[5] Furthermore, the expert opinion testimony advanced by Dr. Elgin Baker raises a genuine issue of material fact regarding whether she actually repressed memories of the tortious conduct. Finally, we believe that Jane I. brought this claim within a reasonable period of time after discovering the abuse. We affirm the result reached by the Court of Appeals, and remand to the trial court for proceedings consistent with this opinion.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.



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FEBRUARY 18TH, 2008

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 22 2007

JOSEPH THOMAS BARTUCCI, JR, Plaintiff-Appellant, v. MICHAEL J JACKSON, Defendant-Appellee.

No. 06-31001 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2007 U.S. App. LEXIS 20045

August 22, 2007, Filed

Before DeMOSS, STEWART, and PRADO, Circuit Judges.

PER CURIAM: n*

FOOTNOTES

n* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Before the court is an appeal by Plaintiff-Appellant Joseph Thomas Bartucci ("Bartucci") of the district court's grant of summary judgment on his claims against Defendant-Appellee Michael Jackson ("Jackson"). Because Bartucci's claims are prescribed under Louisiana law, we AFFIRM the judgment of the district court.

I. BACKGROUND

The allegations in this suit concern Bartucci's claim that he was imprisoned, molested, and assaulted by Jackson. According to Bartucci, on May 19, 1984, Jackson and his handlers forced Bartucci into Jackson's white limousine while in New [*2] Orleans. He was driven to California and held

there for nine days, during which time he was sexually assaulted by Jackson, beaten, and drugged. Bartucci asserts that he was cut with razor blades and had steel wires shoved into his chest. He also claims that one of Jackson's handlers "bashed" Bartucci's head into some concrete. Bartucci states that he bears the scars from the assault to this day.

Bartucci claims that he repressed all memories of this occurrence until November 2003, when he saw a Court TV special on Jackson, at which time Bartucci's memories of the events returned. Bartucci filed suit against Jackson on November 1, 2004, bringing claims of sexual assault, battery, false imprisonment, and intentional infliction of emotional distress. According to Bartucci, he suffered permanent and debilitating injuries as a result of the incident, including heart and eyesight problems, scarring, and psychological trauma. Jackson filed a motion to dismiss for failure to state a claim and, alternatively, motion for summary judgment on December 29, 2005, arguing that Bartucci's claims were prescribed under Louisiana law because they occurred twenty years ago. Following subsequent hearings [*3] and briefing, Jackson's motion also came to include the argument that Bartucci could not create a genuine issue of material fact that Jackson was in New Orleans on the dates in question.

The district court ultimately granted summary judgment on the ground that Bartucci had no evidence that Jackson was in New Orleans on May 19, 1984. Bartucci filed a motion to reconsider, pointing out that his sworn interrogatory responses created a fact issue on that point. The district court denied the motion, and Bartucci now appeals to this

court. We have jurisdiction pursuant to 28 U.S.C. § 1291, as a final judgment has been entered.

II. DISCUSSION

A. Standard of Review

We review a district court's order granting summary judgment de novo. *Morris v. Equifax Info. Servs., L.L.C.*, 457 F.3d 460, 464 (5th Cir. 2006). Summary judgment is appropriate when, after considering the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Bulko v. Morgan Stanley DW, Inc.*, 450 F.3d 622, 624 (5th Cir. 2006). A genuine issue of material [*4] fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In considering a summary judgment motion, all facts and evidence must be taken in the light most favorable to the non-movant. *United Fire & Cas. Co. v. Hixson Bros., Inc.*, 453 F.3d 283, 285 (5th Cir. 2006).

B. Jackson's Presence in New Orleans

On appeal, Bartucci contends that the district court erred when it determined that Bartucci failed to create a genuine issue of material fact that Jackson was present in New Orleans at the time Bartucci claims the false imprisonment and assault occurred. We agree.

The evidence relied upon by Jackson to demonstrate that he was not in New Orleans in May 1984 consists of two affidavits. The first is from Wayne Nagin, an assistant to Jackson in May 1984, who identified a calendar listing Jackson's

appointments and rehearsals in California during the time period in question. The second affidavit is from Charilette Sweeney, who remembered speaking with Jackson at a church in California on May 13, 17, and 20, 1984.

In response, Bartucci relied on his own sworn interrogatory responses, which [*5] placed Jackson in New Orleans on May 19, 1984. n1 Specifically, Bartucci swore that: Approximately May 19th and thereafter for 9 days, Michael Jackson and his handlers placed Mr. Bartucci in a white limousine in what is generally known as the central business district area of New Orleans and kept him in this white limousine for 9 days and 10 1/2 hours of total time with them. Rule 56(c) of the Federal Rules of Civil Procedure permits the court to consider answers to interrogatories in ruling on a motion for summary judgment, so Bartucci's responses are competent summary judgment evidence.

n1 Bartucci also produced several affidavits from other individuals that the district court determined were insufficient to create a genuine issue of material fact. We do not need to consider those affidavits on appeal, as Bartucci's interrogatory responses are sufficient to create a fact issue.

Here, the district court discounted Bartucci's sworn responses because Bartucci did not produce any other contemporaneous evidence of the alleged incident and his allegations were "severe and extraordinary . . . ." Jackson argues that Bartucci's testimony is conclusory and self-serving and should be disregarded [*6] for that reason. However, this is not a case in which a party makes a self-serving statement about his mental state in the face of evidence to the contrary, see In re *Hinsley*, 201 F.3d

638, 643 (5th Cir. 2000), contradicts previously sworn testimony without explanation, see *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495-96 (5th Cir. 1996), or speculates about the intentions of others, see *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994), in which case his testimony might have been properly rejected. Instead, Bartucci provided clear, sworn testimony about a specific factual issue--whether Jackson was in New Orleans on May 19, 1984.

Bartucci has, therefore, met his burden on this summary judgment issue. While his allegations may be sensational, we are not at liberty to make credibility determinations at this stage. See *Bledsoe v. City of Horn Lake*, 449 F.3d 650, 652-53 (5th Cir. 2006) ("When the facts are disputed, the court does not determine the credibility of the evidence and draws all justifiable inferences in favor of the nonmovant."). Consequently, the district court erred when it granted summary judgment for Jackson on this ground.

Our discussion [*7] does not end here, though, as we may affirm the grant of summary judgment on any ground raised below, even if it was not the basis for the district court's decision. *Performance Autoplex II, Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 853 (5th Cir. 2003) (per curiam). Therefore, we next consider Jackson's argument that prescription bars Bartucci's suit against him.

C. Prescription

In his motion before the district court, Jackson argued that Bartucci's claim was prescribed, as it was more than twenty years old when Bartucci filed suit. Pursuant to Louisiana law, n2 "[d]elictual actions are subject to a liberative prescription period of one year," which begins to run the day the injury is sustained. LA. CIV. CODE ANN. art. 3492 (1994 & Supp. 2007). When a complaint reveals on its face that the prescriptive period has lapsed, the plaintiff bears the burden of establishing a suspension or interruption of the prescriptive period. In re *Brewer*, 934 So. 2d 823, 826 (La. Ct. App. 2006); *Martin v. Comm-Care Corp.*, 859 So. 2d 217, 220 (La. Ct. App. 2003). Here, Bartucci's claim is clearly prescribed on its face; therefore, he bears the burden of establishing an exception to prescription.

n2 The [*8] parties do not dispute that Louisiana law applies to this case.

Bartucci relies on his claim of repressed memories and the doctrine of contra non valentum to rescue his lawsuit from prescription. Louisiana courts have used the doctrine of contra non valentum to suspend the running of prescription when the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. In re *Jenkins*, 945 So. 2d 814, 818 (La. Ct. App. 2006); *Watkins v. St. Martin Parish Sch. Bd.*, 929 So. 2d 846, 853 n.5 (La. Ct. App. 2006). The reason behind the rule is the equitable principle that prescription should be suspended when a plaintiff is effectively prevented from enforcing his rights for reasons external to his own will. *Doe v. Archdiocese of New Orleans*, 823 So. 2d 360, 366 (La. Ct. App. 2002). Bartucci asserts that he

repressed the memories of Jackson's alleged assault for twenty years and presents the testimony of his expert, Dr. L. Mulry Tetlow, who found Bartucci credible.

However, the running of prescription is not suspended indefinitely. Rather, prescription is suspended as long as the plaintiff's ignorance of his rights is not "willful, [*9] negligent, or unreasonable." *Stevens v. Bruce*, 878 So. 2d 734, 739 (La. Ct. App. 2004) (internal quotation marks omitted). The prescriptive period begins to run on the date that the plaintiff discovers or should have discovered the facts upon which his cause of action is based. *Hughes v. Olin Corp.*, 856 So. 2d 222, 225 (La. Ct. App. 2003). Stated differently, "Prescription commences when a plaintiff obtains 'actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort.'" *Babineaux v. State ex rel. Dep't of Transp. & Dev.*, 927 So. 2d 1121, 1123 (La. Ct. App. 2005). "An injured party has constructive notice when he or she possesses information sufficient to incite curiosity, excite attention, or put a reasonable person on guard to call for inquiry, and includes knowledge or notice of everything to which that inquiry might lead." Id.

We now turn to Bartucci's allegations in this case. Assuming his claims are true, Bartucci was an adult at the time of the alleged incident. He emerged from Jackson's limousine on May 27, 1984, with cuts from razor blades and wounds from having steel wires shoved into his chest--injuries serious enough [*10] to leave scars to this day. He also had his head slammed into concrete with sufficient force so as to cause eye problems. Further, he was missing nine days of his life. These facts would certainly put a

reasonable person on notice that he had been the victim of a tort. At the very least, the facts are of the type that would "incite curiosity, excite attention, or put a reasonable person on guard to call for inquiry." Yet, there is no evidence that Bartucci took any efforts to discover what had happened to him. n3

n3 We do not know if Bartucci could have uncovered his memories had he attempted to do so in 1984; however, his failure to even try to discover what happened to him demonstrates a lack of diligence which precludes him from establishing an exception to prescription.

We have found only one case in Louisiana in which the court found a fact issue that might permit the tolling of the prescriptive period based on repressed memories. See *Doe v. Archdiocese of New Orleans*, 823 So. 2d 360, 366-67 (La. Ct. App. 2002). Doe, however, is distinguishable in that the sexual abuse of Doe occurred while he was a child, and there were no overt indicators (such as severe physical injuries or loss [*11] of time) that would have put Doe on notice earlier that he had been abused. See id. at 362.

Consequently, Bartucci has not met his burden of showing an exception to prescription under Louisiana law. His severe and permanent injuries, as well as his loss of nine days of memory, would have caused a reasonable person to inquire further into what happened. Because Bartucci's failure to investigate the alleged torts committed against him was unreasonable, the prescriptive period is not tolled, and Bartucci's claims against Jackson are barred. Therefore, we AFFIRM summary judgment for Jackson, although on different grounds than those articulated by the district court.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

AFFIRMED.

APPENDIX B – ORDER OF THE COURT OF APPEAL FOR THE FIFTH CIRCUIT OF OCTOBER 15, 2007, DENYING PETITIONERS' PETITION FOR REHEARING

JOSEPH THOMAS BARTUCCI, JR, Plaintiff-Appellant, v. MICHAEL J JACKSON, Defendant-Appellee.

No. 06-31001

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October 15, 2007, Filed

Appeal from the United States District Court For the Eastern District of Louisiana. New Orleans

On Petition for rehearing

Before DeMOSS, STEWART, and PRADO, Circuit Judges

PER CURIAM :

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX C – OPINION AND ORDER THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DECIDED APRIL 12, 2006

JOSEPH THOMAS BARTUCCI, JR. VERSUS MICHAEL J. JACKSON, CIVIL ACTION NO. 04-2977 SECTION "L" (5)
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
2006 U.S. Dist. LEXIS 20072
April 12, 2006, Decided
Eldon E. Fallon, UNITED STATES DISTRICT JUDGE.

ORDER AND REASONS

Pending before the Court is the Motion to Dismiss for Failure to State a Claim and, Alternatively, Motion for Summary Judgment of Defendant, Michael J. Jackson ("Mr. Jackson"). The motion came on for hearing with oral argument before the Court on January 18, 2006. The parties supplemented their briefs at the request of the Court in late March 2006. For the following reasons, the Defendant's motion is hereby GRANTED.

Plaintiff has also filed a Motion to Strike Unverified Material Filed in Violation of Rule 56(e). This motion came on for hearing on April 12, 2006. Because the documents at issue in this motion are not necessary to the Court's ruling on Defendant's motion for summary judgment, the Plaintiff's [*2] motion is DENIED AS MOOT.

I. Factual and Procedural Background

This case arises out of events that allegedly took place between May 19 and 27, 1984. Plaintiff Joseph Bartucci alleges that, while Defendant Michael

Jackson was in New Orleans for a concert, Mr. Jackson and his representatives falsely imprisoned Mr. Bartucci and transported him to California. During that period, Mr. Bartucci alleges that Mr. Jackson sexually assaulted him repeatedly, both in Mr. Jackson's limousine and in an unknown building in California. Mr. Bartucci claims he has suffered severe and debilitating physical and psychological injuries due to these events, and has brought claims for assault, battery, false imprisonment, and intentional infliction of emotional distress.

Mr. Bartucci alleges that his claims survive prescription. Mr. Bartucci alleges that, due to repressed memories, he had no knowledge of the 1984 events until November 29, 2003. In 2003, Mr. Bartucci recalled what had allegedly happened to him as he watched a Court TV special regarding Mr. Jackson's recent trial in California. Thus, Mr. Bartucci argues that because of his repressed memories he suffered under a disability and was [*3] rendered incapable of bringing suit.

Plaintiff filed his complaint in this Court on November 1, 2004. The Defendant has answered the complaint, and his prior counsel sought a protective order on the case. Magistrate Judge Chasez denied that motion in March 2005. Mr. Jackson's prior counsel re-urged that motion before this Court, but that motion was continued because counsel withdrew from the case. In July and August 2005, the Court ordered Mr. Jackson to appear because he was unrepresented by counsel. The Court fined Mr. Jackson $ 10,000 in August 2005 for his failure to appear in July.

On December 29, 2005, Defendant filed the instant motion to dismiss. Plaintiff opposes the

motion. During oral argument on January 18, 2006, the Court ordered the Plaintiff to depose his psychologist, Dr. Mulry Tetlow, who had provided the expert opinion that Plaintiff suffered from repressed memories relating to his alleged encounter with the Defendant. Plaintiff provided Dr. Tetlow's deposition to the Court on April 5, 2006. The Court shall now discuss the merits of the parties' contentions. [*4]

Defendant argues that the Court should dismiss this case for either of two reasons. First, Defendant argues that factually Plaintiff's Complaint fails to state a claim against the Defendant. Defendant argues that he was not in New Orleans during the dates in question, May 19 to May 27, 1984. Defendant alleges that he was in Los Angeles, California during that period to prepare for his "Victory Tour" which began in late May 1984. Defendant provides the tour dates and the calendar book of Mr. Jackson's personal assistant for May 1984, which shows Mr. Jackson's appointments and schedule during that time (Exhibit R to Defendant's Reply Memorandum). Also, Defendant provides an affidavit of a woman who attended his church in California in 1984, and she states that she recalls seeing and speaking with Mr. Jackson during the week in question in this case (Exhibit 2 to Defendant's Supplemental Memorandum).

Alternatively, Defendant argues that the case should be dismissed because it is prescribed. Defendant argues that Plaintiff's claim is prescribed on its face, and as such, under Louisiana law Plaintiff bears the burden of demonstrating that his cause of action is not prescribed. [*5] Defendant argues that Plaintiff's allegations of repressed

memory are false, and provides affidavits stating that the Plaintiff did not suffer from repressed memories of these events. Moreover, Defendant argues that Plaintiff is a professional litigator, and that his claims are highly spurious in light of his history. Alternatively, Defendant argues that, even if the Plaintiff's allegations are true, the "repressed memory" theory cannot support the suspension of prescription under Louisiana law because the theory is not scientifically sound under Rule 702 of the Federal Rules of Evidence and the standard announced in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Defendant challenges the credentials of Plaintiff's psychologist, Dr. Mulry Tetlow, and challenges his application of repressed memory theory to this case as unsound. Defendant requests a Daubert hearing in the event that the Court is not inclined to grant his motion to dismiss or for summary judgment.

Plaintiff opposes Defendant's motion and argues that his complaint contains well-pleaded allegations that survive a motion to dismiss. Furthermore, Plaintiff [*6] argues that, because discovery is not complete, summary judgment is premature at this stage. Regarding Defendant's factual allegations, Plaintiff counters with the affidavit of Malcolm Boudreaux, a retired New Orleans Levee Board Police Officer (Exhibit 3 to Plaintiff's Reply). Mr. Boudreaux cannot name specific dates, but he recalls seeing a white limousine bearing California plates near the Convention Center in the spring of 1984. The driver of the car stated that Michael Jackson was inside. However, Mr. Boudreaux did not personally see Mr. Jackson. Regarding Defendant's

challenge to Dr. Tetlow, Plaintiff argues that, without a pending Daubert motion, Defendant should not be permitted to attack the credibility of Plaintiff's psychological expert's opinion upon repressed memories. Moreover, Plaintiff argues that Defendant's information regarding Plaintiffs' prior civil and criminal history is irrelevant. In summary, Plaintiff argues that, prior to the completion of discovery, he is entitled to a presumption that his claims are valid and supported by evidence.

a. Defendant's Motion to Dismiss for Failure to State a Claim

The Federal Rules of Civil Procedure permit a defendant [*7] to seek dismissal of a complaint based on the "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), a district court should construe the complaint liberally in favor of the plaintiff, assuming all factual allegations to be true. See *Leleux v. United States*, 178 F.3d 750, 754 (5th Cir. 1999). Rule 12(b)(6) motions are viewed with disfavor and are rarely granted. See id. However, a complaint should be dismissed if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

Under the Rule 12(b)(6) standard, Defendant's motion to dismiss fails. Defendant's arguments all depend upon evidence external to the Plaintiff's Complaint, and require the Court to make factual findings beyond the scope of the complaint. As such, a motion to dismiss is inappropriate. Accordingly, the Court shall evaluate the Defendant's arguments as a

motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

[*8] b. Defendant's Motion for Summary Judgment

Summary judgment will be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 315 (5th Cir. 1995). To oppose a motion for summary judgment, the non-movant cannot rest on mere allegations or denials but must set forth specific facts showing that there is a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-22, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The Court finds that the Defendant has successfully demonstrated that there is no genuine issue of material fact for trial. Mr. Jackson has offered two affidavits that demonstrate that Mr. Jackson was not in New Orleans during the period [*9] when the events alleged in the Complaint took place. Wayne Nagin was a personal assistant to Mr. Jackson in the spring of 1984, and kept a calendar book of Mr. Jackson's appointments in May 1984. In his affidavit, Mr. Nagin states that Mr. Jackson was in Los Angeles attending rehearsals for his Victory Tour from May 20 to May 27, 1984. The calendar reflects a series of appointments each day during the period. In addition, Mr. Jackson offers the affidavit of Charilette R. Sweeney. Ms. Sweeney

lived in Encino, California in 1984 and attended Mr. Jackson's church in Woodland Hills, California. Ms. Sweeney states that she had known Mr. Jackson since 1976 and would visit with him several times a week during congregation meetings and book studies. Ms. Sweeney states that she specifically remembers speaking to Mr. Jackson on May 13, 17 and 20, 1984 because Mr. Jackson received an award from President Reagan on May 14, 1984 and spoke to her about the experience before and after his trip to Washington, D.C.

The Court finds this evidence conclusively demonstrates that Mr. Jackson was in California from May 19 to May 27, 1984, and could not have been in New Orleans to participate in the events [*10] alleged in Plaintiff's Complaint. Mr. Bartucci has provided the affidavit of Malcolm Boudreaux; however, this affidavit only suggests that Mr. Jackson might have been in New Orleans sometime in the spring of 1984. Mr. Boudreaux cannot say when his encounter with the limousine driver occurred. Moreover, Mr. Boudreaux never saw or spoke to Mr. Jackson, but only heard that Mr. Jackson was in town. This affidavit simply does not create a genuine issue of material fact in light of Mr. Jackson's compelling, corroborated evidence that he was in California during the period in question.

Because the Court finds that the Defendant is entitled to summary judgment on the issue of whether Mr. Jackson was in New Orleans from May 19 to 27, 1984, the Court does not reach the parties' arguments concerning prescription and the validity of repressed memory theory.

III. Conclusion

Accordingly, Defendant's Motion to Dismiss for Failure to State a Claim and, Alternatively, Motion for Summary Judgment is hereby GRANTED. In addition, Plaintiffs Motion to Strike Unverified Material Filed in Violation of Rule 56(e) is DENIED AS MOOT.

New Orleans, Louisiana, this 12th day of April, 2006.

Eldon [*11] E. Fallon
UNITED STATES DISTRICT JUDGE

APPENDIX D – OPINION AND ORDER THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DECIDED SEPTEMBER 12, 2006, AND FILED SEPTEMBER 13, 2006

JOSEPH THOMAS BARTUCCI, JR. VERSUS MICHAEL J. JACKSON, CIVIL ACTION NO. 04-2977 SECTION "L"(5)
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
2006 U.S. Dist. LEXIS 65342
September 12, 2006, Decided
September 13, 2006, Filed
Eldon E. Fallon, UNITED STATES DISTRICT JUDGE.

ORDER

Before the Court is Plaintiff's Motion for Reconsideration (Rec. Doc. No. 90), heard with oral argument on June 7, 2006. The Court has studied the legal memoranda submitted by the parties, the record and the applicable law. It is now fully advised on the issue and ready to rule. For the following reasons, the motion is DENIED.

I. Factual and Procedural Background

This case arises out of events that allegedly took place between May 19 and 27, 1984. Plaintiff Joseph Bartucci alleges that, while Defendant Michael Jackson was in New Orleans for a concert, Mr. Jackson and his representatives falsely imprisoned Mr. Bartucci and transported him to California. During that period, Mr. Bartucci alleges that Mr. Jackson sexually assaulted him repeatedly, both in Mr. [*2] Jackson's limousine and in an unknown building in California. In particular, Mr. Bartucci

alleges that Defendant and his agents inflicted a wide range of abuse and violence upon him, including allegations that the Plaintiff was cut with razor blades, jabbed with steel wires, bitten, and drugged, and that his head was beaten on concrete by one of Mr. Jackson's bodyguards. Mr. Bartucci claims he has suffered severe and debilitating physical and psychological injuries due to these events, and has brought claims for assault, battery, false imprisonment, and intentional infliction of emotional distress.

Mr. Bartucci alleges that his claims survive prescription. Mr. Bartucci alleges that, due to repressed memories, he had no knowledge of the 1984 events until November 29, 2003. In 2003, Mr. Bartucci recalled what had allegedly happened to him as he watched a Court TV special regarding Mr. Jackson's recent trial in California. Thus, Mr. Bartucci argues that because of his repressed memories he suffered under a disability and was rendered incapable of bringing suit.

Plaintiff filed his complaint in this Court on November 1, 2004. Plaintiff's initial counsel of record withdrew from the case [*3] in January 2005 and provided sealed documents to the Court at that time in support of his motion to withdraw. In December 2004, the Defendant answered the complaint, and his initial counsel sought a protective order limiting the scope of discovery in the case. Magistrate Judge Alma L. Chasez denied that motion in March 2005. Mr. Jackson's counsel re-urged that motion before this Court, but the motion was continued because initial counsel withdrew from the case on April 29, 2005. In July and August 2005, the Court ordered Mr. Jackson to appear because he was unrepresented

by counsel. The Court fined Mr. Jackson $ 10,000 in August 2005 for his failure to appear in July.

On December 29, 2005, Defendant filed a motion to dismiss or alternatively for summary judgment which was heard with oral argument on January 18, 2006. At oral argument, the Court believed that the deposition of Plaintiff's treating physician, Dr. Tetlow, would be useful to clarify the basis for Plaintiff's argument that his claims survive prescription. The Court ordered Plaintiff to depose Dr. Tetlow and to supplement their briefs by early February 2006.

Defendant in support of his motion for summary judgment provided [*4] the Court with two affidavits, among other documents. Wayne Nagin, a personal assistant to the Defendant in 1984, provided an affidavit stating that Mr. Jackson was in California during the period in question in this case, and Mr. Nagin provided copies of his calendar from the weeks in question in 1984. (Rec. Doc. No. 70). Charilette R. Sweeney also provided an affidavit in which she stated that she attended the same church in California as the Defendant in May 1984, and that she recalls seeing him and speaking with him in California on several of the dates at issue in this case. (Rec. Doc. No. 79).

To controvert this evidence, Plaintiff relied upon his own sworn answers to interrogatories in which he stated that he was with Mr. Jackson in May 1984 in New Orleans. Plaintiff also supplied several affidavits. In his affidavit, Malcolm Boudreaux, a retired New Orleans Levee Board police officer, recalled that sometime in the spring of 1984, he spoke with a limousine driver at the World's Fair in New Orleans and this individual told him that

Michael Jackson was inside the limousine he was driving. (Rec. Doc. No. 66). n1 Plaintiff also submitted an affidavit of Mark Ellis, a former limousine [*5] driver of Defendant, who stated that he was prepared to take an unspecified cross-country trip with Michael Jackson in May 1984, but that the driver was informed he would not accompany Mr. Jackson on the trip. Id. Also, Thomas Newton provided an affidavit in which he stated that his company rented a limousine to representatives of Michael Jackson for a trip in May 1984 from Los Angeles to Boca Raton, Florida. *Id.*

n1 Plaintiff subsequently filed a second affidavit of Mr. Boudreaux on August 25, 2006 to clarify the first affidavit (Rec. Doc. No. 112). In the second affidavit, Mr. Boudreaux states that he spoke with the unidentified limousine driver at the World's Fair in New Orleans approximately one week after it opened on May 12, 1984.

Upon reviewing this evidence, the Court found that Plaintiff had not met his burden of rebutting Defendant's sworn affidavits in support of his motion for summary judgment. Because there was no genuine issue of fact as to whether Mr. Jackson was in New Orleans in May 1984, [*6] the Court granted summary judgment for Defendant and dismissed Plaintiff's case.

On April 28, 2006, Plaintiff filed the instant Motion for Reconsideration. The Defendant opposes this motion. The Court shall now address the parties' arguments.

II. Plaintiff's Motion for Reconsideration

The procedural grounds for Plaintiff's motion are unclear from the face of the motion. Apparently the motion is grounded in Rule 59(e) of the Federal Rules

of Civil Procedure as a motion to alter, amend, or vacate the Court's judgment, and in Rule 60(b) as a motion for relief from judgment. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 353 (5th Cir. 1993).

Under Rule 59(e), a court may reopen a case that has gone to final judgment if a party demonstrates a manifest error of law or fact or newly discovered evidence. *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). The motion should be used sparingly, and the motion is not a proper vehicle for "rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." Id. at 478-79. The Court [*7] must consider the evidence in the record at the time of the motion for reconsideration as well as the time of judgment. *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 349 (5th Cir. 1989). Under Rule 60(b), a party may seek relief of judgment for any reason justifying such relief, including the rule's enumerated reasons like mistake and excusable neglect. Fed. R. Civ. P. 60(b). In particular, the Court when evaluating a Rule 60(b) motion should balance the need for finality of judgment against the need to render just decisions, based upon all the operable facts. *Bohlin*, 6 F.3d at 356.

Both sides have asked the Court to consider the other party's prior history in ruling upon this motion. In an early brief, Defendant submitted an unverified copy of Plaintiff's extensive history of civil litigation. (Rec. Doc. No. 61). Plaintiff's civil history revealed some eighteen civil and criminal suits filed either by or against the Plaintiff in the last seventeen years; the suits include allegations of sexual abuse against a minister, charges of stalking and bigamy, and allegations of his connection to a fraudulent

insurance [*8] scheme, among others. This unverified evidence was not in proper form for consideration upon summary judgment. The Plaintiff also asks the Court to consider the Defendant's prior civil litigation involving allegations of child molestation. As has been well-publicized, Defendant was tried and acquitted for sexual abuse of a minor in California in 2005, and there have been prior, similar allegations against the Defendant.

Each side is mistaken in their beliefs that any of these prior acts are relevant for purposes of this motion. This prior history was not considered, and should not have been considered, when the Court ruled upon Defendant's motion for summary judgment. Accordingly, the Court now addresses the parties' substantive arguments.

Plaintiff's central argument in support of its Motion for Reconsideration is that the Court failed to take into account the Plaintiff's sworn answers to interrogatories, which were verified on January 17, 2006. (Rec. Doc. No. 74). Plaintiff argues that these discovery responses should be afforded significant weight because they provide detailed allegations that rebut the affidavits supporting Mr. Jackson's argument that he was not in New Orleans [*9] on the dates in question in May 1984. Further, Plaintiff contends that he should be allowed to take the depositions of the Defendant, Mr. Nagin and Ms. Sweeney, among others.

Defendant argues that the Court's decision was correct, but cites no law in support of its position. Defendant argues that he has provided compelling, corroborated evidence that he was not in New Orleans during the period at issue, and that the

Court should not waste any more time with this vexatious, frivolous litigation.

It has long been established that, if they comply with the evidentiary standards of Rule 56(e) of the Federal Rules of Civil Procedure, a party's verified answers to interrogatories may serve as support or rebuttal of a motion for summary judgment. See *Fowler v. S. Bell Tel. & Tel. Co.*, 343 F.2d 150, 154 (5th Cir. 1965) (stating that verified pleadings may serve as summary judgment evidence in a proper case). Moreover, it is also well-established that a party's own sworn affidavit or sworn pleadings can serve to create a genuine issue of material fact sufficient to defeat a motion for summary judgment. See, e.g., *Dibidale of La., Inc. v. American Bank & Trust Co.*, 916 F.2d 300, 307-08 (5th Cir. 1990) [*10] (finding genuine issue of material fact from affidavit of a party's agent); *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893 (5th Cir. 1980) ("a genuine issue can exist by virtue of a party's affidavit even if it conflicts with earlier testimony in the party's deposition"). It is further well-established that a district court is not permitted to make credibility determinations or to resolve factual disputes in a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Dibidale*, 916 F.2d at 307-08.

Some review of the essential legal standards behind summary judgment is useful here. One of the central purposes of the motion for summary judgment in the federal system is as a "device for unmasking frivolous claims and putting a swift end to meritless litigation." *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). See also *Washington Post Co. v. Keogh*, 125

U.S. App. D.C. 32, 365 F.2d 965, 967-68 (D.C.Cir. 1966) ("Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long [*11] and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or coerce settlement.") (internal citations omitted). Thus, at summary judgment, the district court serves the role of gatekeeper, as it has a "responsibility to decide whether a genuine issue of fact exists" before the case will be allowed to proceed to trial. *Keogh*, 365 F.2d at 967.

Accordingly, upon a motion for summary judgment, a district court must determine whether a genuine issue of material fact exists. A fact is material if it "might affect the outcome of the suit under the governing law[.]" *Anderson*, 477 U.S. at 248. In this case, Michael Jackson's alleged presence in New Orleans sometime between May 19 and 27, 1984 is clearly a factual predicate for Plaintiff's claims and is thus a material fact. More importantly for this motion, a dispute about a material fact must be genuine, meaning that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party[.]" Id.

When a moving party has met its burden under Rule 56(c) of the Federal Rules of Civil Procedure [*12] to show there is no genuine issue of material fact, the opponent "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "[H]e must bring to the district court's attention some affirmative

indication that his version of relevant events is not fanciful." *Quinn*, 613 F.2d at 445. This means that the opponent must come forward with "specific facts" showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

In particular, "if the factual context renders respondent's claim implausible ... respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. A non-moving party must come forward with more than "conclusory allegations, speculation, and unsubstantiated assertions" once the moving party has met his burden for summary judgment. *Douglass v. United Services Auto: Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996). If the evidence brought forth by the non-moving party is "merely [*13] colorable" or is "not significantly probative," summary judgment is appropriate. *Anderson*, 477 U.S. at 249-50.

Moreover, while many courts have accepted a plaintiff's own affidavit, deposition, or verified pleadings to defeat summary judgment, a number of courts have rejected this proof when the plaintiff's statements are self-serving and conclusory. See *Evans v. City of Chicago*, 434 F.3d 916, 933 (7th Cir. 2006) ("as this court has repeatedly held, the self-serving affidavit of a plaintiff is ipso facto insufficient to create a genuine issue of material fact"); *Fanslow v. Chi. Mfg. Ctr., Inc.*, 384 F.3d 469, 483 (7th Cir. 2004) ("a plaintiff cannot defeat summary judgment by submitted a self-serving affidavit that contains the bald assertion of the general truth of a particular matter") (internal citations and quotations omitted); *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 504 (7th Cir.

2004) ("self-serving statements contained in an affidavit will not defeat a motion for summary judgment when those statements are without factual support in the record") (internal citations and quotations omitted); *Guldin v. Conoco, Inc.*, 37 Fed.Appx. 712 (5th Cir. 2002) [*14] ("Guldin offers only his own self-serving and conclusory affidavit ... [t]he district court correctly concluded that Guldin's affidavit was no bar to entry of summary judgment").

The requirement that the dispute of material fact must be "genuine" is the central distinction between this case and the cases Plaintiff cites in support of his motion for reconsideration. Plaintiff relies upon a number of cases in other circuits in which a party's own affidavit or deposition was sufficient to defeat a motion for summary judgment. *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 56-57 (2d Cir. 1998); *Wilson v. Williams*, 997 F.2d 348, 350-51 (7th Cir. 1993); *Jackson v. Duckworth*, 955 F.2d 21 (7th Cir. 1992); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1231 (3d Cir. 1988); *Mumphree v. United States Bank of Utah*, 282 F.Supp.2d 1294 (D. Utah 2003). However, there is a key distinction between the instant case and these cases: Plaintiffs' answers to interrogatories in this case do not create a "genuine" issue of material fact.

Plaintiff argues that his sworn answers to interrogatories provide a wealth [*15] of details about the alleged molestation itself, and as such, Plaintiff argues his answers are specific rebuttals, not conclusory allegations. However, Plaintiff misstates the inquiry. The issue of material fact that Plaintiff must rebut in this motion is not whether the molestation occurred in the manner that Plaintiff describes it, but whether Michael Jackson was in

New Orleans in May 1984. Plaintiff's attempt at rebuttal of Defendant's proof on this issue is conclusory and non-specific. Plaintiff provides the following proof that Defendant was in New Orleans during the period in question: 1) his own sworn statement that Michael Jackson was in town, which he admits to having repressed over twenty years 2) the affidavits of Malcolm Boudreaux, who recounts his conversation sometime in the week following May 12, 1984 with an unnamed limousine driver who stated that Michael Jackson was in New Orleans, 3) the affidavit of Mark Ellis, a limousine driver who stated that he heard that Michael Jackson was to take an unspecified "cross-country trip" in May 1984, but the affiant did not accompany him on the trip and does not know if such a trip actually occurred, and 4) the affidavit [*16] of Thomas Newton, who rented a limousine to Michael Jackson's representative for a trip from California to Florida in May 1984.

It is unclear that Malcolm Boudreaux or Mark Ellis would be able to provide admissible testimony at trial; there appears to be hearsay problems with the proposed testimony. 0While there is no requirement that the evidence presented at summary judgment be in a form that would be admissible at trial, there must be a "showing" of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Moreover, even if Mr. Boudreaux and Mr. Ellis were to testify, their testimony is conclusive of nothing. Neither can remember specific dates. Neither of them state the names of the people to whom they spoke. Most importantly, none of the affidavits specifically place Michael Jackson in New

Orleans from May 19 to 27, 1984. While Mr. Newton's affidavit suggests that a limousine rented by Michael Jackson may have traveled through Louisiana sometime in May 1984, it too is non-specific in that it does not state that Mr. Jackson himself used this limousine or that the limousine traveled through New Orleans. Similarly, Mr. Boudreaux states [*17] in his second affidavit that he went to the World's Fair in New Orleans approximately one week after it opened on May 12, 1984, but he admits that at no time did he actually see Michael Jackson or witness other physical evidence of his presence besides the fact that he spotted a white limousine with a California license plate. His statement that an unidentified individual told him that Michael Jackson was inside the limousine is also too vague to be sufficient. These affidavits simply do not provide the concrete, specific facts needed to create a "genuine" issue of material fact as to Michael Jackson's whereabouts.

Plaintiff's allegations of abuse in this case are severe and extraordinary, and include descriptions of acts of violence against the Plaintiff. However, Plaintiff has been unable to produce any contemporaneous evidence, medical or otherwise, that the incidents he describes actually occurred. He is also unable to produce any credible evidence other than mere speculation as to the Defendant's presence in New Orleans at the time in question. Given the extreme nature of Plaintiff's allegations, the fact that he cannot substantiate a basic predicate for his claim like Michael [*18] Jackson's whereabouts leads the Court to believe that summary judgment was appropriately granted. 1If the moving party's evidence renders the opponent's claim "implausible"

or even "merely colorable," the opponent must come forward with a showing of concrete, specific facts that are in dispute. *Anderson*, 477 U.S. at 249-50; *Matsushita*, 475 U.S. at 587. Plaintiff simply has not done that here.

On the other hand, Defendant has presented two affidavits that provide concrete, specific recollections and documentary evidence that Michael Jackson was in California from May 19 to 27, 1984. Wayne Nagin provides his daily calendar of Mr. Jackson's activities during those weeks, and Charilette Sweeney remembers seeing and speaking with Mr. Jackson in California on specific dates in May 1984. Based upon the showings of both parties, the Court finds that no reasonable jury could find that Michael Jackson was in New Orleans from May 19 to 27, 1984. Thus, there is no "genuine" issue of material fact, and summary judgment was appropriately granted.

The Court is not resolving factual disputes here; the Court is merely observing that there is no factual dispute as [*19] to the whereabouts of Michael Jackson at the time in question. The Court finds it improper to give the Plaintiff an opportunity to conduct further discovery, such as the depositions of the Defendant and his two witnesses. As stated previously, the Plaintiff's accusations allegedly took place over twenty years ago. Defendant has provided evidence that he was not in New Orleans during the relevant time period, and Plaintiff's only specific rebuttal is his own sworn answers to interrogatories. No reasonable juror would conclude that the Defendant was in fact present. To allow further discovery and expense of time and financial resources is not appropriate in this case.

Plaintiff's argument in support of his motion for reconsideration is a dangerous one. 2A plaintiff cannot be allowed to transform his mere allegations and unsubstantiated assertions into substantial evidence by having the assertions placed in an affidavit or verified form. To do so would be to allow an individual to protract needlessly a meritless case, and would incur wasteful costs for both the judicial system and for the individuals who must expend time and resources to defend against baseless allegations. This is exactly [*20] the result that the summary judgment procedure is intended to avoid. As the U.S. Supreme Court has stated, the "mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. Because Plaintiff has failed to rebut Defendant's evidence regarding his whereabouts, summary judgment was properly granted for Defendant.

III. Conclusion

Accordingly, Plaintiff's Motion for Reconsideration is hereby DENIED.

New Orleans, Louisiana, this 12th day of September, 2006.

Eldon E. Fallon

UNITED STATES DISTRICT JUDGE

Appendix E
Opinion Letter of Dr. L. Mulry Tetlow, March 4, 2005

Mulry Tetlow, Ph.D.
Licensed Clinical Psychologist
Louisiana License No. 294
16 Fontainebleau Dr. New Orleans, LA 70125-3452 (504) 866-2123

CONFIDENTIAL PSYCHOLOGICAL REPORT

Client: Thomas Bartucci
Age: 39
Date of evaluation: 03/04/05
Referred by: Mr. Louis Koerner
Reason for referral: To render an opinion concerning Mr. Bartucci's repressed memories.

Thomas Bartucci is the plaintiff in a suit against Michael Jackson. The issue is his claim of having repressed the memory of the abuse for twenty years, recalling it when he learned of another person accusing Michael Jackson of sexual abuse.

The fact of repressing the memory of a very painful experience is well established in mental health circles.

Thomas's experiences fit the pattern of repressing sexual abuse and later recalling the abuse after learning of someone else's experience of abuse.

I had Thomas take the House-Tree-Persons test and the vocabulary subtest of Wechsler Adult Intelligence Scale. Both tests give evidence of personality characteristics which made him susceptible to the abuse he says he experienced. Abusers and their henchmen are skilled at picking out victims. Those personality characteristics make

it more difficult for him to work through the experience, and achieve mental health.

Thomas is in need of psychotherapy and said that he intends beginning therapy soon.

L. Mulry Tetlow, Ph.D.

Mulry Tetlow, Ph.D.